FILED
JUL 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 74-10

RICHARD F. NESTLER
DONALD B. MAY
NESTLER-MAY COMPANY,

Petitioners,

v.

CHARLES R. RICHEY,
UNITED STATES DISTRICT JUDGE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CARL L. SHIPLEY
1108 National Press Building
Washington, D.C. 20045
(202) 783-1647

Counsel for Petitioners.

Of Counsel:

SHIPLEY, AKERMAN, STEIN & KAPS
National Press Building
Washington, D.C. 20045

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

Page

CITATIONS i

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF FACTS 4

REASONS FOR GRANTING THE WRIT

I. The Order of the Court Below Derives Petitioners of Their Right to a Trial by Jury 5

II. The Rules Enabling Act, 28 U.S.C. 2072, Contains an Unconstitutional Grant of Legislative Power 9

III. The Order of the Court Below Denying Mandamus Directing Judge Richey to Vacate his Order Striking Petitioners' Jury Demand is an Unconstitutional Abuse of Judicial Discretion 12

CONCLUSION 13

APPENDIX A – Order Striking Plaintiffs' Jury Demand 1a

Order Denying Writ of Mandamus 2a

TABLE OF AUTHORITIES

Cases:

Albert v. R.P. Farnsworth & Co., 176 F.2d 198 (CCA 5 1949) 13

Beacon Theatres v. Westover, 359 U.S. 500, 504, 511, 79 S.Ct. 948, 3 L.Ed. 988 (1958) 12, 13

Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962) 12

Page

Cases, continued:

Dimick v. Schiedt, 293 U.S. 474, 486 12

Hanna v. Plumer, 380 U.S. 460, 464, 85 S.Ct. 1136 (1965) 8, 10

Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 66 S.Ct. 242, 90 L.Ed. 185 (1945) 10

Rogers v. Missouri Rac. R. Co., 352 U.S. 500, 510 13

Scott v. Neely, 140 U.S. 106, 109-110 6

Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234 (1964) 11

Sibbach v. Wilson & Co., 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1940) 10

Swofford v. B&W, Inc., 336 F.2d 406, 409 (CCA 5 1964) 13

Western Geographical Co. of America v. Balt. Assoc., Inc., 440 F.2d 765 (CCA 2 1971) 12

Statutes and Rules:

United States Constitution:

Article I, Section 1 2
Article I, Section 7 2
Article V 8
Fifth Amendment 7
Seventh Amendment 2, 5, 6, 7, 8, 12

United States Code:

5 U.S.C. 901 11
5 U.S.C. 906 11
18 U.S.C. 3771 9
28 U.S.C. 723 10
28 U.S.C. 906 11
28 U.S.C. 1254(1) 2
28 U.S.C. 2072 . . . . . 2, 3, 6, 7, 8, 9, 10, 11

Page

Statutes and Rules, continued:

Federal Rules of Civil Procedure:
Rule 35 . . . . . 10, 11
Rule 37 10
Rule 38 . . . . . 4, 5
Rule 38(a) 12
Rule 38(b) 2, 3, 5, 6, 7, 8, 10, 12
Rule 39 5
Rule 39(b) 4, 6, 7, 12

Miscellaneous:
Supreme Court Order of January 21, 1963 7
Supreme Court Order of February 28, 1966 . . . . 7, 8, 9, 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No.

RICHARD F. NESTLER
DONALD B. MAY
NESTLER-MAY COMPANY,

Petitioners,

v.

CHARLES R. RICHEY,
UNITED STATES DISTRICT JUDGE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on April 25, 1974.

OPINIONS BELOW

The orders of the Court of Appeals and of the District Court for the District of Columbia appear in the Appendix hereto.

JURISDICTION

The order of the Court of Appeals was filed on April 25, 1974, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Rule 38(b), Federal Rules of Civil Procedure, Title 28, U.S. Code, is in violation of petitioners' right to a trial by jury as guaranteed by the Seventh Amendment to the Constitution?

2. Whether the Rules Enabling Act, 28 U.S.C. 2072 is an unconstitutional delegation of the power to legislate?

3. Whether respondent Judge Richey violated petitioners' right to due process by striking their jury demand?

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Article I, Section 1:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

U.S. Constitution, Article I, Section 7:

> "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes Law, be presented to the President of the United States; . . ."

U.S. Constitution, Amendment VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

STATUTORY PROVISIONS INVOLVED

U.S. Code, Title 28, Section 2072, Rules of Civil Procedure:

"The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. As amended Nov. 6, 1966, Pub.L. 89-773, Sec. 1, 80 Stat. 1323."

Rule 38(b), Federal Rules of Civil Procedure:

"Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the

other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party."

Rule 39(b), Federal Rules of Civil Procedure:

"Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues."

STATEMENT OF FACTS

On August 13, 1973, petitioners filed suit against Exxon Corporation in the United States District Court for the District of Columbia claiming treble damages and breach of contract and requesting an injunction, growing out of defendant's and its subsidiaries' concerted actions unreasonably to restrain trade and attempt to monopolize by intentional refusal to make, use and vend the Nestler-May nested bag system in accordance with their exclusive license.

On October 9, 1973, Exxon filed its answer to the complaint. No jury demand was made by either petitioners or Exxon at that time or within 10 days thereof.

On the same day as Exxon filed its answer it also filed 40 interrogatories and a request for production of 28 documents.

On October 17, 1973, petitioners requested an enlargement of time within which to answer the interrogatories because of the length and complexity of

the interrogatories and request for documents. On November 5, 1973, the respondent extended the time to answer interrogatories to January 10, 1974. Said pleadings for the first time raised issues which petitioners believe fairly entitle them to their constitutional right to have a jury trial on certain issues not theretofore clearly ascertainable from Exxon's answer.

On February 11, 1974, petitioners requested a jury trial of all issues under Rule 38, F.R.C.P., and moved the District Court therefor under Rule 39, F.R.C.P., on February 15, 1974. Exxon moved to strike petitioners' jury demand on grounds it was made after the 10 day cut-off time in Rule 38(b).

On March 7, 1974, the respondent district judge entered an order granting Exxon's motion to strike the jury demand and in effect denying petitioners' motion under Rule 39. (Appendix i).

Petitioners applied to the court below for a writ of mandamus directing respondent Judge Richey to vacate his order striking petitioners' jury demand. On April 25, 1974, the court below denied the petition for writ of mandamus without an opinion. (Appendix ii).

REASONS FOR GRANTING THE WRIT

I.

THE ORDER OF THE COURT BELOW DEPRIVES PETITIONERS OF THEIR RIGHT TO A TRIAL BY JURY.

The Seventh Amendment provides in substance that the right of "trial by jury shall be preserved." The claims made by petitioners in their complaint in the District Court included treble damage claims under the antitrust laws, breach of contract, and a request for injunctive relief. Some of the claims are within the meaning of

"suits at common law" in the Seventh Amendment. In the Rules Enabling Act, 28 U.S.C. 2072, Congress, while empowering the Supreme Court to prescribe general rules regulating the practice and procedure of the district courts of the United States, carefully limited the rule-making authority:

> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury . . ."

By denying petitioners' request for a writ of mandamus directing respondent Judge Richey to vacate his order striking petitioners' jury demand, the court below has abridged and modified their undiluted constitutional right to a jury trial. Judge Richey based his action on a finding the jury demand was "untimely made having been made four months after the last pleading filed," and upon "there being inadequate reason shown to cause the Court to exercise its discretion under Rule 39(b) of the Federal Rules of Civil Procedure." (Appendix i hereto).

Rule 38(b), F.R.C.P., purports automatically to deprive petitioners of their Seventh Amendment right to a jury trial, unless demand for a jury trial is made "not later than 10 days after the service of the last pleading directed to such issue." This language abridges and modifies the substantive right to a jury trial. This Court in *Scott* v. *Neely*, 140 U.S. 106, 109-110, said, "In the Federal courts this (jury) right cannot be dispensed with, except by assent of the parties entitled to it . . ." The presumption of a right to a jury trial and any protection of assent as a precondition to a non-jury trial is totally negated by Rule 38(b) and its 10 day limitation and automatic waiver. This is not assent to non-jury proceedings, this is a shifting of the burden from jury trial absent assent to dispense to non-jury trial absent a

10 day demand. In the case *sub judice* the need for a jury trial was not apparent until Exxon's defense became revealed by reason of the discovery it was pursuing. When the need for a jury trial became clear to petitioners, they made a demand and motion under Rule 39(b). The Seventh Amendment contains no substantive provision which limits the right of jury trial to a 10 day affirmative demand. And even if that limitation can reasonably be read into the Seventh Amendment, Judge Richey's arbitrary refusal to exercise his authority under Rule 39(b) and allow a jury trial was in and of itself a violation of the Seventh Amendment and/or the Fifth Amendment due process right which must necessarily incorporate the right to a jury trial.

As stated by Mr. Justice Black and Mr. Justice Douglas in this Court's Order of January 21, 1963, in pertinent part:

> "... the authorizing statute itself qualifies this Court's power by imposing upon it a solemn responsibility not to submit rules that 'abridge, enlarge or modify any substantive right' and by specifically charging the Court with the duty to 'preserve the right to trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.' Our chief objections to the rules relate essentially to the fact that many of their provisions do 'abridge, enlarge or modify' substantive rights and do not 'preserve the right to trial by jury' but actually encroach upon it."

The fact that the Supreme Court has adopted and transmitted Rule 38(b) to Congress in accordance with 28 U.S.C. 2072 does not resolve the constitutional question. In Mr. Justice Black's dissent to this Court's Order of February 28, 1966 amending certain federal rules he stated the problem:

> "The Amendments to the Federal Rules of Civil and Criminal Procedure today transmitted to the Congress are the work of very capable advisory committees. These committees, *not the Court*, wrote the rules. Whether by this transmittal the individual members of the Court who voted to transmit the rules intended to express approval of the various policy decisions the rules embody I am not sure. I am reasonably certain, however, that the Court's transmittal does not carry with it a decision that the amended rules are all constitutional. For such a decision would be the *equivalent of an advisory opinion* which, I assume the Court would unanimously agree, we are without constitutional power to give." (Emphasis added).

Rule 38(b) is not confined to "practice and procedure of the district courts," the scope of 28 U.S.C. 2072 as interpreted by this Court in *Hanna* v. *Plumer*, 380 U.S. 460, 464, 85 S. Ct. 1136 (1965), and the cases cited therein. Rule 38(b) in effect amends the Seventh Amendment to the Constitution, not by following the procedures of Article V thereof, but by way of a rule adopted in excess of this Court's jurisdiction under 28 U.S.C. 2072.

The actions of Judge Richey and the Court below justify the grant of certiorari to review the question of whether Rule 38(b) modifies the substantive right to a jury trial guaranteed by the Seventh Amendment.

II.
THE RULES ENABLING ACT, 28 U.S.C. 2072, CONTAINS AN UNCONSTITUTIONAL GRANT OF LEGISLATIVE POWER.

In this Court's Order of February 28, 1966, Mr. Justice Black reiterated in his dissent to that order his belief that certain of the provisions of 28 U.S.C. 2072 are unconstitutional:

> "I am likewise opposed to transmittal of the civil rules. In the first place I think the provisions of 28 U.S.C. 2072 (1964 ed.), under which these rules are transmitted and the corresponding section, 18 U.S.C. 3771 (1964 ed.) relating to the criminal rules, both of which provide for giving transmitted rules the effect of law as though they had been properly enacted by Congress are unconstitutional for reasons I have previously stated."

In footnote 1 to this Court's Order of February 28, 1966 amending the federal rules, Mr. Justice Black said:

> "In a statement accompanying a previous transmittal of the civil rules, Mr. Justice Douglas and I said:
>
> 'Mr. Justice Black and Mr. Justice Douglas are opposed to the submission of these rules to the Congress under a statute which permits them to 'take effect' and to repeal 'all laws in conflict with such rules' without requiring any affirmative consideration, action, or approval of the rules by Congress or by the President. We believe that while some of the Rules of Civil Procedure are simply housekeeping details, many determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation which, in our judgment, the Constitution requires to be initiated in

and enacted by the Congress and approved by the President. The Constitution, as we read it, provides that all laws shall be enacted by the House, the Senate, and the President, not by mere failure of Congress to reject proposals of an outside agency . . .' (Footnotes omitted.) 374 U.S. 865-866."

This Court has dealt with various aspects of its rule making power, but has never met head on the onstitutional objections to 28 U.S.C. 2072 set forth by Justices Douglas and Black. For example, in *Hanna* v. *Plumer*, 380 U.S. 460, 85 S. Ct. 1136 (1965), supra, this Court said ". . . the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it *Congressional power* to make rules governing the practice and pleading in those courts . . ." (Emphasis added). However, the decision does not pass on Rule 38(b) or the question of whether 28 U.S.C. 2072 includes, as thought by Justices Douglas and Black, an unconstitutional delegation of legislative power. In *Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438, 66 S. Ct. 242, 90 L.Ed. 185 (1945), this Court said that "The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency." It did not address itself to the constitutionality of the Rules Enabling Act, even as then written, confirming its decision only to determining that Rule 4(f) was procedural and involved no substantive change in the law. In *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 61 S. Ct. 422, 85 L.Ed. 479 (1940), the only question was the validity of Rules 35 and 37 of the Rules of Civil Procedure promulgated under the authority of the Act of June 19, 1934, c. 651, 48 Stat. 1064; 28 U.S.C. 723, the predecessor to 28 U.S.C. 2072, the present Rules Enabling Act, and did not pass upon the

constitutionality of the original Act or the present Act. This Court did say, however, in that case:

> "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make *rules not inconsistent with the statutes or Constitution of the United States.*" (Emphasis added).

While recognizing that the power of Congress to delegate the rule making power is limited by the Constitution, it did not pass on the constitutionality of the Act itself.

Similarly, *Schlagenhauf* v. *Holder*, 379 U.S. 104, 85 S. Ct. 234 (1964), was limited to passing on the validity of a rule, not the constitutionality of the Rules Enabling Act:

> "We hold that Rule 35 . . . is free of constitutional difficulty and is within the scope of the Enabling Act."

Petitioners submit that the constitutional questions respecting the sections of the Rules Enabling Act remarked upon by Justices Douglas and Black are worthy of resolution by this Court at this time and in this case. Other acts of Congress, such as the Reorganization Plan Act of 1949, 5 U.S.C. 901, 906, which permit plans by the President to become effective unless rejected by Congress within 60 days (28 U.S.C. 906), involve the President in the legislative process, as required by the Constitution, and do not purport to legislate by "mere failure of Congress to reject proposals of an outside agency," the point made by Justice Black in his dissent quoted hereinabove.

The substantial constitutional question respecting delegation of legislative power to this Court by Congress in 28 U.S.C. 2072 justifies the grant of certiorari to review the order below.

III.

THE ORDER OF THE COURT BELOW DENYING MANDAMUS DIRECTING JUDGE RICHEY TO VACATE HIS ORDER STRIKING PETITIONERS' JURY DEMAND IS AN UNCONSTITUTIONAL ABUSE OF JUDICIAL DISCRETION.

Rule 38(a), F.R.C.P., says "The right of trial by jury as declared by the Seventh Amendment . . . shall be preserved to the parties inviolate." Petitioners have set forth hereinabove that the Rule 38(b) limitation on the right to jury trial by means of imposing an affirmative duty to demand the right within 10 days or lose the right is an abridgement of the substantive Seventh Amendment right.

This Court has consistently said "that any curtailment of the right to a jury trial should be scrutinized with great care," *Dimick* v. *Schiedt*, 293 U.S. 474, 486, and that "the right to grant mandamus to require a jury trial where it has been improperly denied is settled." *Beacon Theatres* v. *Westover*, 359 U.S. 500, 79 S. Ct. 948, 3 L.Ed.2d 988 (1958); see also *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 82 S. Ct. 894, 8 L.Ed.2d 44 (1962); *Western Geographical Co. of America* v. *Balt. Assoc., Inc.*, 440 F.2d 765 (CCA 2 1971). The *Beacon Theatres* case involved denial of a jury trial in a treble damage antitrust suit, as in the case *sub judice*. This Court granted certiorari to review an interlocutory order that otherwise would have let the case go to non-jury trial.

Petitioners believe the court below had a duty to issue a writ of mandamus directing Judge Richey to grant petitioners' motion under Rule 39(b), F.R.C.P., for a jury trial. ". . . when the discretion of the court is invoked under Rule 39(b), the court should grant a jury trial in the absence of strong and compelling reasons to the

contrary." *Swofford* v. *B&W, Inc.*, 336 F.2d 406, 409 (CCA 5 1964); *Albert* v. *R.P. Farnsworth & Co.*, 176 F.2d 198 (CCA 5 1949). This Court has recognized there are "Special and important reasons for the grant of certiorari . . . when lower federal . . . courts persistently deprive litigants of their right to a jury determination." *Rogers* v. *Missouri Pac. R. Co.*, 352 U.S. 500, 510.

In the *Beacon Theatres* case, supra, this Court granted certiorari to review the refusal by a court of appeals of a writ of mandamus to require a district judge to grant a jury trial. It was an antitrust case, as is petitioners' case herein. This Court said:

> ". . . the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an essential part of the Congressional plan for making competition rather than monopoly the rule of trade . . ." (359 U.S. 500 at 504).

As to a writ of mandamus in the case *sub judice*, this Court in *Beacon Theatres*, supra, (359 U.S. 500 at 511) said:

> ". . . we think the right to grant mandamus to require jury trial where it has been improperly denied is settled."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the District of Columbia Circuit.

Respectfully submitted.

Of Counsel:
SHIPLEY, AKERMAN,
STEIN & KAPS
National Press Building
Washington, D.C. 20045

CARL L. SHIPLEY
1108 National Press Building
Washington, D.C. 20045
(202) 783-1647
Counsel for Petitioners.

Date: July 25, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD F. NESTLER, et al., Plaintiffs,	)	
v.	)	Civil Action No. 1686-73
EXXON CORPORATION, Defendant.	)	

ORDER

Upon consideration of Defendant's Motion to Strike the Plaintiffs' Jury Demand, the Plaintiffs' Opposition to the Motion, and the Defendant's Reply thereto, and it appearing to the Court that the Jury Demand was untimely made having been made four months after the last pleading filed, and there being inadequate reason shown to cause the Court to exercise its discretion under Rule 39(b) of the Federal Rules of Civil Procedure, it is this 7th day of March, 1974,

ORDERED that the Defendant's Motion to Strike the Plaintiffs' Jury Demand be and hereby is granted.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

FILED
Mar 7 1974
James F. Davey, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1425

Richard F. Nestler, et al., Petitioners

September Term 1973

v.

Charles R. Richey, U.S. District Judge

Before: Bazelon, Chief Judge and Wright, Circuit Judge

ORDER

On consideration of petitioners' petition for writ of mandamus, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

United States Court of Appeals
For the District of Columbia Circuit

FILED APR 25 1974
HUGH E. KLINE
CLERK